Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1811

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DAVID R. BENSON and JANICE M. BENSON,
Petitioners,

v.

RAYMOND C. HIGHTOWER, et al.,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION

Malcolm L. Edwards
Robert G. Sieh
of Counsel for Petitioner

EDWARDS & BARBIERI
3701 Bank of California Center
Seattle, WA 98164
(206) 624-0974

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REPLY TO ARGUMENT OF RESPONDENTS

The respondents' brief generally fails to distinguish between the actions of petitioner David Benson and the actions of petitioner Janice Benson.

The respondents recite certain actions of petitioner David Benson and claim that these actions gave rise to probable cause "to believe that petitioners had violated the federal customs laws." (Br. for the Resp. 6, emphasis supplied) The respondents ignore the fact that Janice Benson did nothing which justified either a search of her person or her arrest. Thus, even if we accept the respondents' illogical premise that David Benson's suspicious activities justified a search for an arrest for actions which were not criminal, nothing justifies a search and arrest of Janice Benson for activities which were not criminal.

The respondent also states that "petitioner David R. Benson made a false declaration of the value of the plaques...." (Br. of Resp. 6) Customs agents prepared the "false declaration." David Benson was ignorant of the contents of the packages, and simply accepted at face value the agents' description:

> Q Would you relate what occurred when you arrived at the airport to pick up the package?

A Well, I went in and —

Q Go ahead.

A (Continues) I went in to the air freight office and identified myself and said that I wanted to get the package, and they brought the package out - or two packages. At any rate, they brought the packages out and I can't remember who the man was that I was dealing with in this, but I believe he asked me if I knew what was in it and I said I didn't know what was in them and I told them if there was any duty that needed to be paid on them, if he would tell me what it was I would be glad to pay whatever it was, or that needed to be paid. He produced a document of some kind, a listing of what was in there and the prices that had been affixed or estimated what it was on the duty that they had affixed to it, then gave it to me to sign, and I signed it, then I gave him the money and he gave me the packages and I took them.

(Dep. of David Benson 27) The customs agents had no reason to believe that David Benson knowingly signed the false declaration which they themselves prepared. Accordingly, the customs agents did not even rely on the "false declaration" in applying for the search warrant.

The respondents discussed the fact that the

complaint did not allege that the federal agents "acted other than in good faith." (Br. of Resp. 7) The respondents have not cited any cases holding that the plaintiff must allege bad faith to support a claim under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). The allegations of probable cause and good faith must appear in the answer because they constitute a defense. Schuer v. Rhodes, 416 U.S. 232, 247-48 (1974). There is no requirement under the Federal Rules of Civil Procedure that a plaintiff's complaint must allege and refute the defendant's defense.

The respondents argue that, "petitioner's recitation of their allegations concerning their execution of the warrant does not bear on the reasonableness of propriety of the agent's actions challenged in Counts I, III and IV of the Complaint." (Br. for the Resp. 8) The respondent's position is overly simplistic. The overbreadth of the search demonstrates that the respondents dealt generally

with the petitioners in bad faith. Unreasonable and bad faith execution of the search warrant supports an inference that the respondents acted in bad faith in obtaining the search warrant and in arresting the petitioners.

CONCLUSION

Petitioners respectfully submit that the court should grant this petition for a writ of certiorari.

Respectfully submitted,
EDWARDS & BARBIERI
By: Malcolm L. Edwards
Robert G. Sieh

Counsel for Petitioners

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